

PROPERTY RIGHTS NO HOUSING RIGHTS YES

Humans can live full and happy lives without property rights being defined by the real estate lobby. They cannot do the same without housing.

by J. David Hulchanski

ONE OF THE SURPRISE ELEMENTS OF THE federal government's constitutional package is the proposal to include property rights. In *Shaping Canada's Future Together: Proposals*, the federal government reaffirmed "unequivocally" its support for the rights guaranteed in the Charter of Rights and Freedoms. But then the following statement was added:

However, the Charter does not guarantee a right to property. It is, therefore, the view of the Government of Canada that the Canadian Charter of Rights and Freedoms should be amended to guarantee property rights.

Nothing else is said about "property rights." There is no definition offered, or any other rationale.

This insertion of a "guarantee" of "property rights" in the federal constitutional proposals is unfortunate and should be dropped. Equally unfortunate is the lack of any new steps towards guaranteeing the social and economic rights of Canadians.

The federal government should have considered some or all of the rights contained in the *International Covenant on Economic, Social and Cultural Rights*. Wording similar to that of Article 11(1) of the *Covenant*, which among other related basic necessities of life, guarantees housing as a fundamental

human right, should become part of Canada's Constitution. This would address the fundamental rights, needs and interests of a far greater number of Canadians and it would help Canada fulfil its international human rights commitments. The *Covenant* requires nations to "Recognize the right of everyone to an adequate standard of living . . . including adequate food, clothing and housing, and to the continuous improvement of living conditions." The nations ratifying it agree that they, "Will take appropriate steps to ensure the realization of this right."

The *Covenant* is a treaty which Canada and 97 other nations have ratified. The implementation of the *Covenant* is based on the principle of "progressive realization." Nations agreed to take steps, within the resources available, to progressively achieve full realization of the social, economic and cultural rights by all appropriate means. The *Covenant* was signed in 1966 and came into force in 1976. The current proposal to amend the Constitution is an appropriate opportunity for Canada to enshrine these rights.

It is not contradictory nor is it an act of political partisanship to oppose entrenching property rights in the Constitution and to favor entrenching social and economic rights, and, in particular, the right to housing. The term "property rights" presents special conceptual and practical problems. Unlike the right to housing, it is not possible to sufficiently define property rights for constitutional purposes and, unlike the necessity for all humans to have a decent place to live, there is no fundamental human rights issue associated with ownership of real estate—the most common definition of what property rights include.

Property Rights: The Problem of Definition

The problem with a "guarantee" of "property rights" in the Constitution is one of definition: what are we guaranteeing? What are "property rights"?

If what is meant is property rights in its most narrow, popular sense—the ability to own a house and other real property, and the right not to be arbitrarily deprived of this property—this is already a respected right in Canada. Canada has a long history of recognizing due process in relation to property ownership. The history of Canadian housing policy is one of promoting home ownership and offering a host of incentives, from direct subsidies, to special tax benefits, to a steady stream of residential mortgage innovations.

If property rights is to be defined in the way being proposed by many of the advocates of entrenching these two words in Canada's Constitution, a very different kind of country is being proposed.

The Ontario Real Estate Association, for example, in a brochure titled *Property Rights: Protecting a Vital Investment*, cites the following list in answer to the question: "When we speak of property rights, just what do we mean?":

Property Rights include the following:

- the right to buy, hold and occupy real property;
- the right to maintain privacy in your home by excluding others from it;
- the right to sell, rent, lease or give your property away;
- the right to leave your property to your heirs in a will;
- the right to use your property in any manner you desire;
- the right to enjoy the goods which come from your

land, such as agricultural produce;

- the right to destroy your property if you so desire.

It is the last five that would substantially change Canada and, in some cases, harm those who are not fortunate enough to own a great deal of property. To what degree this might happen depends on how some judges might ultimately rule on cases brought before them by property owners. Here are some possible examples:

- *The right to sell, rent, lease* could mean that regulations on rents are an illegal infringement of property rights.
- *The right to leave property to heirs* could be interpreted as preventing inheritance taxes.
- *The right to use property in any manner* could be used to challenge all aspects of zoning, building and environmental regulations.
- *The right to enjoy the goods* from your land could be used against marketing boards but also against some forms of property taxes.
- *The right to destroy property* could be used to prevent rental housing demolition or historic building conservation regulations.

The courts may never interpret property rights in this fashion. But, again, they just might. Why take the chance?

Housing Rights can be defined

It can be claimed that "housing rights" present the same definitional problems as "property rights." This is not the case. First, it should be obvious to everyone that human life depends on having shelter. It does not depend on owning this shelter. The organization of human society must include a method by which housing is built, allocated and maintained. A guarantee of a right to housing means that all people must have access to adequate and appropriate shelter and that our housing institutions must be improved if they are not achieving this end.

What does the "right to housing" mean? For the right to housing to be enforceable, a specific definition of minimum housing standards everyone ought to have access to will have to be developed. This is not a difficult task. There are obvious criteria relating to adequate quality such as a safe site and structure, basic infrastructure and services, secure tenure and affordable cost.

Ensuring that people have a guarantee to a certain minimum standard of housing in no way threatens the housing or overall well-being of other Canadians. Unlike the difficult notion of "property" and "the right to property," there is nothing difficult or complicated about "housing" and "the right to housing."

Many Canadians do not have access to any housing (the homeless) while many others are inadequately housed and find that they cannot afford good quality housing appropriate to their needs (e.g., the size of their family). Surely this is a very different and much more fundamental and a more primary category of a rights issue than that of property rights.

International Human Rights Agreements

If the advocates of enshrining housing as a right oppose property as a right, is there any support for this position in the international human rights agreements and covenants?

Advocates of the right to housing often quote Article 25(1) of the *Universal Declaration of Human Rights*:

Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Why then don't these housing rights advocates also quote Article 17 of the *Universal Declaration*?

Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.

The advocates of enshrining property rights often quote Article 17 though rarely, if ever, Article 25. The real estate industry brochure quoted above, for example, notes that the "United Nations Declaration of Human Rights (1948) also upholds the right to own property and to be free of arbitrary interference in those rights." There is no mention of the right to housing, though the rights of homeowners are discussed.

We certainly have the right to be selective in what we choose to define as *fundamental* human rights. But any moral suasion one hopes to obtain by quoting an international declaration is surely lost if we quote from it selectively.

Are both groups of advocates being selective? No. It is the real estate industry which is quoting from the human rights agreements selectively and not the housing rights advocates.

The *Universal Declaration of Human Rights* was adopted in 1948. It is an extremely important document in human history, the first such major internationally agreed upon declaration of a broad range of political, civil, social and economic rights. But it is only an initial declaration, the basis upon which other covenants—legally binding treaties—were to be drafted. A declaration is not a legally binding instrument. When the *International Covenant of Social, Economic and Cultural Rights* was drafted it did not include a clause on the right to own property. Property is not one of the categories of rights considered to be absolutely fundamental to human well-being.

There is nothing wrong with quoting the *Universal Declaration* for support of one's position but it is the *Covenant* that is the legally binding treaty which Canada signed and which contains the most recent internationally agreed upon definition of social, economic and cultural rights.

The language of "rights" is reserved in political discourse for those interests and considerations that have *special* importance, an importance which would warrant overriding other values and ideals whenever they conflict with the protection of rights.

Not everyone in Canada owns real estate—the form of property advocates of entrenching property rights are most concerned about. There are many in Canada who will never be able to own real property. Even the majority who own one type of real estate, their home, own no other real property. Many homeowners are also unlikely to ever own additional real estate because of the difficulty of accessing home ownership in the first place—the long period of saving enough for a down payment and then the huge burden of the mortgage.

Property rights, as defined by the Ontario Real Estate Association, have no direct and vital connection with most Canadians, only those who are fortunate enough to own much more than just their home. Property rights of the type being

proposed could even be used to harm the interests of the vast majority of Canadians.

Property rights, therefore, is not a category of a *universal* right, something so fundamental to human well-being that it cannot be deprived and must be held by *all* humans. It is an error to lump property rights with the fundamental social and economic rights guaranteed by the *International Covenant on Economic, Social and Cultural Rights*.

Property rights is a slogan of a particular ideology of a special interest group in society. The federal proposal to entrench property rights is an attempt to place in the Constitution the values of the right wing of the Conservative caucus in the House of Commons which generally represents the views of the real estate industry and other business interests. If property rights were to be enshrined it would have the effect of enlisting the courts in the day-to-day political debates over issues relating to the meaning of property and the role of government in regulating property, using judges to help take positions on and then to enforce a particular political ideology.

Property Rights are not being eroded in Canada

One often hears the claim that property rights are being eroded. This is a major argument used for entrenching property rights in the Constitution. According to a study by the Ontario Real Estate Association, for example, "Property rights are being eroded at an ever-increasing pace" due to an unabated "avalanche of legislation that affects the citizen's property rights."

This view is based on a belief that private property is essential to individual freedom and that government interference with property rights is a step towards despotism. This attitude can be traced back to the Magna Carta, which guaranteed that "no freeman shall be . . . deprived of his freehold [private property] . . . unless by the lawful judgment of his peers and by the law of the land."

Centuries later, the U.S. Bill of Rights proclaimed: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without a just compensation."

These two historic documents, however, do not refer to "property rights" or "rights to property" in the same way as the real estate lobby in North America. It is only in the 20th century that the historic reference to "property" has been focused on one type of property, real estate and, focused even more on *private* property—private ownership of real estate.

The emphasis on private property rights has emerged in order to make claims of *exclusive* individual rights, one person's right to exclude others from some right or benefit relating to the property. This is in response to democratic decisions relating to land use and land development regulations. It is an attempt to turn back the clock by limiting the role of the community in setting land use and development standards. A political power struggle is being played out in the ongoing debate over the exact nature of the bundle of rights associated with property ownership—between the rights of the individual and the rights of the community.

The problem with the claim to property rights is that there is not a specific defined set of rights associated with property which are ideal. Further, any changes in the set of rights associated with owning property (real estate) in any particular country at any particular time is not necessarily a step

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backwards (an "erosion").

There are well recognized rights associated with property ownership in Canada, though they are not constitutionally enshrined. These are socially defined bundles of rights bestowed by laws and regulations on owners of real estate, providing the owner with certain decision making authority. It is this bundle of rights which in sum add up to "property." This is why property rights cannot be defined in the abstract. The bundle is socially defined by past and present legislation and society is continually adjusting what it defines to be the bundle of rights associated with owning real estate. As political theorist C.B. Macpherson points out, the "actual institution [property], and the way people see it, and hence the meaning they give the word, all change over time."

Macpherson argues that a false distinction has developed between property rights and human rights. The social, economic and cultural rights are, he argues, part of an individual's property. We need to "restore the original liberal meaning of property, as when Locke and his contemporaries spoke of a property in one's person, one's life and liberty, as well as one's worldly goods." In his view "property" not only includes real estate but also much more. The "old" and the "new" categories of rights are the same:

All that has changed is the acceptable view of possible ways of securing the individual right to the material means of a fully human life.

Thus, the word "property" is extremely problematic. The rights to property are the creation of positive law no matter what some social or political theory may presuppose about their metaphysical origins in the natural or supernatural order of things. Leaving it up to judges to define for us what is meant by property and the bundle of rights associated with property is much more dangerous to all Canadians than to leave it up to the democratic will of an electorate.

Humans can live full happy lives without the property rights being defined by the real estate industry. They cannot do the same without the categories of human rights contained in the *International Covenant on Economic, Social and Cultural Rights*. ♦

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